No. 21803

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNIFORM OIL COMPANY, a Montana corporation,

Appellant,

-vs-

PHILLIPS PETROLEUM COMPANY, a Delaware corporation, W. J. BRIDGES, DONALD W. CULLEN, CURTICE GARDNER and JAMES H. NORWOOD,

Appellees.

BRIEF ON APPEAL OF THE INDIVIDUAL APPELLEES, BRIDGES, CULLEN, GARDNER AND NORWOOD

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STATEMENT OF THE CASE

The statement of the case contained in appellant's brief is incomplete and misleading, and this statement is intended to supplement and correct appellant's statement.

The amended complaint charges the appellees with *a specific conspiracy*. It alleges that Phillips and the individual appellees "conspired to destroy the business *of the plaintiff*". (Italics ours). (Para-

graph 13, page 4, lines 8 and 9 of the amended complaint). It is further alleged that it was "*the intent* of the defendants.....to destroy the business *of the plaintiff*.....and thereafter.....to increase the price to a higher predetermined level". (Italics ours). (Paragraph 14.B., of the amended complaint, pages 4 and 5).

Contrary to what is said at page 6 of appellant's brief, Phillips Petroleum Company had *no* control over the operations of Bridges. (Tr. 121, 122, 152, 153, 154, 155, 164, 165, 166, 167).

Bridges, Cullen, Gardner and Norwood were all independent businessmen, and this is borne out by the whole testimony of Bridges, Gardner and Norwood; and there is not a scintilla of contrary evidence in the record. Bridges, the jobber, owned the gasoline in question from the moment he picked it up at the refinery or pipeline, and sold it either at his own station to the public or to the appellee dealers as his own product. (Tr. 98, 99). Likewise, the appellees, Cullen, Gardner and Norwood, bought the gasoline from Bridges and sold it as their own merchandise to the public and made their own decisions as to prices. (Tr. 122, 123, 126, 128, 129, 159, 160, 165, 166).

There was testimony that lowering of gasoline prices was "discussed" by the appellees. But Bridges, Gardner

and Norwood (Cullen was not called to testify) insisted that there was no agreement or conspiracy between any of the appellees, including Phillips Petroleum Company, and that the station operators set their own prices, after Bridges simply *informed* the others that he was going to lower the prices at his own retail station. (Tr. 122, et seq., 166, 167, 168, 110, 111). All that Bridges did was to *inform* Phillips Petroleum Company and the appellee retail dealers that he was going to lower the price of gasoline in his own retail gasoline station at 1901 North Main Street in Helena; and when he did, the other appellee dealers followed him in the matter of price lowering, as did some of the other retail stations in the city, all for the purpose of meeting competition.

There was no evidence that appellees, or any combination of appellees possessed the *power* to monopolize the market or restrain competition; on the contrary, the evidence was uncontradicted that Phillips was only one of many suppliers, Bridges was only one of many wholesalers, and Bridges, Cullen, Gardner and Norwood were only four of many retailers.

ARGUMENT

Uniform Oil had the burden of proving every material allegation of its amended complaint. The trial court directed the verdict at the close of Uniform's case on

the ground of failure of proof. Summarized, the material allegations of the complaint are (1) violation of the Sherman Act, (2) damages, and (3) causal relation between alleged violation and damages. The claim is grounded solely upon alleged violation of Sections 1 and 2 of the Sherman Antitrust Act, and a particular conspiracy is alleged, to-wit: *Concerted price cutting with specific intent thereby to destroy the business of all independents, thus obtain a monopoly, and thereafter to raise prices back up to "a higher predetermined level."* (pp. 4-5, of amended complaint). Uniform Oil in the trial court had the full burden of proving this alleged violation, *i.e., that particular conspiracy.* No other or lesser proof would suffice. Uniform also had the burden of proving its alleged damages and that such damages were *caused* by the alleged active conspiracy.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 289 F. 2d 86 (1961), this court clearly stated the general rule:

> "In a treble damage action under 15 U.S.C.A. § 15, it is clear that the plaintiff, in order to make out a claim on which recovery might be had, has the burden of proof to establish the following elements of his case: (1) That the defendant has violated the antitrust

laws; (2) that plaintiff has suffered an injury to his business or properties susceptible of being described with some degree of certainty in terms of money damages; and (3) that a causal connection exists between the defendant's wrongdoing and the plaintiff's loss. * * * Of course, a failure by the plaintiffs to prove *any one* of the three elements of their case would require the trial judge to direct a verdict for the defendants." (Italics ours).

The courts have laid down specific rules as to the burden of proof of each of these three elements.

1. Burden of proof as to the violation--conspiracy to restrain trade and monopolize.

"Plaintiffs have the burden of establishing that defendants *possess* monopoly power. Monopoly power is the power to control prices or exclude competition. *United States v. E. I. DuPont DeNeMours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125, 90 L.

Ed. 1575 (1946); *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).* * *

"Defendants are not guilty of an attempt to monopolize within the meaning of § 2 of the Sherman Act. In order to prove such an attempt *plaintiffs must show that defendants had a specific intent to destroy competition and build a monopoly.* *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953). Plaintiffs must further prove conduct, on the part of defendants, 'which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.'" (Italics ours). (*Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 339, D.C. La. (1963), affmd. 323 F. 2d 363).

Not a shred of evidence was presented showing possession of monopoly power on the part of appellees, intent to destroy competition and build a monopoly, or ability or possibility of accomplishing monopolization or a dangerous probability of it. On the contrary, the

inference to be drawn from the evidence is that no combination of the appellees could possibly have monopolized the market. In fact, Bridges was himself driven out of business by the gas war which he alone started. (Tr. 106).

It is absurd to say on this evidence that Phillips and these four individual appellees with their four gasoline stations had the power to drive all of the other major oil companies and "independent" stations out of business and thus create a monopoly, or that they had the power to create a dangerous probability of such a result.

The rule regarding specific intent merits further elucidation. As pointed out in *Centanni, supra,* specific intent to monopolize is absolutely required to prove an *attempt* to monopolize under Section 2 of the Sherman Act; and the power to monopolize or to create a dangerous probability of monopolization is necessary to prove *any* violation of Section 1 or Section 2. Thus, the question of specific intent does not become material until such power is proved. The power has not been proven herein and appellant's case therefore falls at that point. But if it be assumed, arguendo, that the power has been proved, then the rule with regard to specific intent changes. As is said in *United States v. New York Great A & P Tea Co.,* 67 F. Supp. 626, 642, D.C.

Ed. Ill. (1946):

> "Dealers have the right to sell freely without restraint. Have defendants unreasonably crippled that right? Such is our real question. Defendants have the right to set prices at such figures as to meet competition. *It is only when price cutting extends to destruction or unreasonable restraint of competition or taking losses in order to attain an ultimate monopoly or partial monopoly that the law is violated.* * * * The (plaintiff) must prove either that there was a specific wrongful intent to effect restraint of trade or that the acts of defendants had the inherent tendency necessarily unreasonably to restrain trade. As Mr. Justice Lurton said *(United States v. Reading Co.*, 226 U.S. 324, 33 S. Ct. 90, 103, 57 L. Ed 243): 'Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful

cases, turn upon the intent to be inferred from *the extent of the control thereby secured over the commerce affected*, as well as by the method which was used. Of course, if the *necessary* result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence.' (Citing cases)." (Italics ours, parenthesis ours).

Thus, the rule is that if the power to monopolize is proved, then the plaintiff must go further and prove either a specific intent to restrain trade and build a monopoly, or that such is the *necessary* result of the conspiracy.

Now, all that has been shown in the instant case is that the individual appellees lowered the price of gasoline in their stations, and as is stated in the last quoted case, they had a perfect right to do this, so long as they were merely competing in the market. There is no evidence to show that they were doing anything else. There is nothing to show that the price cutting here extended "to destruction or unreasonable restraint of competition or taking losses in order to attain an ultimate monopoly or partial monopoly". Evidence of "specific

wrongful intent" is wholly lacking. The record is likewise devoid of evidence that such reduction of prices by appellees "had the inherent tendency *necessarily unreasonably* to restrain trade". (Italics ours). The most that can be said for the evidence is that it merely shows appellees lowered their prices. Certainly, Uniform Oil Company has no vested right to restrain all of the other retail gasoline dealers in Helena for all time from lowering their prices. *Nevertheless, this is precisely the contention and position of Uniform Oil Company.*

All that is said above assumes, arguendo, that an *agreement* (conspiracy) between the appellees to reduce prices was proved. But, in fact, the record is devoid of such proof, and no such agreement, in the context of this case, can be inferred from the mere fact that prices at the different stations were lowered at about the same time and that Bridges, as a courtesy, supplied Cullen, Gardner and Norwood with signs for the display of prices. In a different context, this sort of evidence, circumstantial at best, might be of some value, but it is certainly not sufficient to infer a conspiracy in this case. Conscious parallelism in reduction of prices is the most that is shown.

It is respectfully submitted that the appellant wholly failed to carry its burden of proof on the matter of statutory violation.

2. Burden of proof on the matter of damages.

(a) Injury to the public. Before the plaintiff can recover for any alleged damage to itself, it must *first* prove injury to the public from the alleged violation by the defendants. As is said in *Shotkin v. General Electric Co.*, 171 F. 2d 236, C.A. 10th (1948):

> "Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert. (Citing cases)." (Parenthesis ours).

Not even an attempt was made by Uniform Oil Company to prove any injury to the public. On the contrary, the inference to be drawn from appellant's own evidence is that the public derived vast financial benefit from the reduction of gasoline prices in Helena. To sustain Uniform Oil here would be to confer upon it a vested right to have the prices of its alleged competitors forever crystalized at levels substantially above its prices. Any concerted lowering of prices by even a very small segment of its alleged competitors would be subject to injunction, treble damages and criminal

prosecution. Conferring such a right upon Uniform Oil would defeat the purpose of the Sherman Act, which is to insure competition. Of course, this is the reason for the rule that injury to the public must be first *proved* by competent evidence. Stated another way, the rule simply says that conduct not resulting in proved injury to the public is no violation of the Sherman Act. Appellant's case falls at this point.

(b) Injury to Uniform's business or property. Even if Uniform Oil had carried its burden thus far, that would not be sufficient. It had to go further and *prove* that it "suffered an injury to its business or property *susceptible of being described with some degree of certainty in terms of money damages*". (Italics ours). *Continental Ore Co., supra.* Here, again, the failure of proof is complete. As is said in *National Wrestling Alliance v. Meyers,* 325 F. 2d 768, 777, C.A. 8th (1963):

> "Proof essential to recovery of damages in antitrust litigation has been the subject matter of many Clayton Act claims, as revealed by authorities cited (above). The rule thereby established may be summed up thus: The fact of damages, as well as the amount thereof, is entirely a question of sufficiency of evidence. In every case, the question

is whether the *data* of which the evidence consists is such that a just and reasonable *inference* and *estimate* thereof can reasonably be drawn from the evidence *so that a verdict will not be based on mere speculation or guesswork.* The usual common law standards are to be applied in establishing the fact, as well as the extent of the injury in such cases." (Italics ours).

In addition to proving the damages themselves with reasonable certainty as to amount, by presenting data from which such amount can be inferred or estimated, plaintiff must prove that the defendants' violation of the Sherman Act *was the most probable, proximate cause of the damages. (Siegfried v. Kansas City Star Co.,* 193 F. Supp. 427, D.C. Mo. (1961)).

Uniform Oil in this case totally failed to meet the standard of proof, both as to the damages themselves and the causal relationship.

The only evidence presented on the subject of damages is contained in the testimony of John Vance at pages 42, 43, 44, 45 and 46 of the transcript, as follows:

"Q Now with reference to your damages: How much did you pay for the station you had? * * *

"A We purchased the station from Lydia Magnuson for twenty-five thousand dollars.

"Q And what year was that?

"A 1961 or two. * * *

"Q And did you improve it?

"A Yes, we did.

"Q And how much monies did you put in improvements during --

"A We put in, two occasions, new pumps and concrete mats for the pumps to rest on, and that was about the extent of improving the property, except for a neon sign and some overhead high density service station type lights, lighting equipment.

"Q And did you develop the business out there as the time went along?

"A Yes, we did.

"Q Did you have an increase in volume?

"A Well, we started with nothing and built the business up to in excess of two hundred thousand gallons a year, and during the last year it plummetted down again to next to nothing. Sixty thousand gallons, I think..

"Q What happened to the business?

"A Well, following the reduction in price, and the rest of the major stations meeting that reduced price, we were unable to continue in the same scale we had and the business deteriorated and ultimately closed it up.* * *

"Q Now, at the time that you closed the station up was the station indebted?

"A Yes. At that time we had lost that last year in excess of twelve thousand dollars. We owed fourteen thousand, over fourteen thousand dollars to our supplier, Big West Oil Company.

"Q And how did you pay that off? * * *

"A THE WITNESS: We settled with the Big West Oil Company at the time we sold the station. We sold ten feet to the highway commission for the expansion of Euclid Avenue, and we sold the remainder of the station to Tom Connelly in Butte, who runs the Town Pump, I believe. And we were able to settle that fourteen thousand five hundred dollar debt to the Big West Oil Company

with a payment to them of eleven thousand dollars and deed to the pumps and equipment that were present on the station. * * *

"Q Do you have an opinion as to the value of that business as a going business prior to the time that this -- of the gas reduction? * * *

"THE WITNESS: Yes, I do.

"BY MR. SKEDD:

"Q And what was the value of that business?

"A As a going business I would say that that business was certainly worth sixty thousand dollars."

There is absolutely no other evidence in the record on the subject of damages or the cause of damages.

There is no "data.....such that a just and reasonable inference and estimate (of damages) can reasonably be drawn". The witness says that in 1961 the station was purchased for $25,000.00; that it was improved; that they "built the business up to in excess of 200,000 gallons a year"; that "during the last year it plummetted down again"; that "following the reduction in price we were unable to continue in the same scale we had and the business deteriorated and ultimately closed it up"; that the corporation was indebted in the sum of

$14,000.00 to the supplier; that they settled with the supplier for $11,000.00 and the pumps and equipment; that they sold "ten feet" to the highway commission for an undisclosed amount and sold "the remainder of the station to Tom Connelly" for an undisclosed amount; that in the witness' opinion the value of the "business" prior to the reduction in gasoline prices was $60,000.00.

How can it be said that this evidence proved "that plaintiff has suffered an injury to his business or property *susceptible of being described with some degree of certainty in terms of money damages"?* (Italics ours). On this evidence, how could a jury even guess or speculate as to an amount of damages?

This court has been even more specific as to the standard of proof of damages. In *Standard Oil Company of California v. Moore*, 251 F. 2d 188, Cert. Den. 356 U.S. 975 (1958), the plaintiff claimed destruction of his retail gasoline business arising from the defendants' refusal to sell him gasoline. This court said:

> "In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) What profit has the business made *over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?* (2) What is the reasonable

prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16-17, 69 S. Ct. 1434, 93 L. Ed. 1765. These are the factors which would influence a prospective purchaser." (Italics ours).

That sort of evidence is totally absent from the instant record.

In *Flintkote v. Lysfjord*, 246 F. 2d 368, 394 (1957), this court said:

> "There are three chief types of evidence which the decisions have approved as the basis for the award of damages. (1) Business records of the plaintiff or his predecessor before the conspiracy arose. (2) Business records of comparative but unrestrained enterprises during the particular period in question. (3) Expert opinion *based on items (1) or (2).* (p. 392) * * *
>
> "We do not hold nor imply that a jury verdict could not be upheld under any circumstances solely on the testimony of

the plaintiffs. We hold only that if they are qualified to make these estimates, *the record must show their competency and the factual basis upon which they rest their conclusions."* (p. 394). (Italics ours).

Again, in *Lessig v. Tidewater Oil Company*, 327 F. 2d 459, 473, 474, this court said concerning the admissibility of the plaintiff's opinion as to lost profit:

> "Such opinion testimony is admissible, but only if based upon facts which rationally support it. The offer of proof was simply that it was Lessig's opinion, based upon his experience and knowledge, that but for Tidewater's restrictive practices his earnings would have approximated seven hundred dollars a month, or about four hundred dollars per month more than he in fact averaged. *There was no offer to show how his estimate was made. The testimony was inadmissible, absent this foundation, and it was excluded upon that express ground."* (pp. 473, 474). (Italics ours).

Mr. Vance's conclusion as to the value of Uniform's business as a "going concern" was objected to by all

appellees on the grounds he was not qualified to answer and no sufficient foundation laid.

It is respectfully submitted on the basis of the foregoing authorities that there was a total failure of proof of damages.

As to the question of proximate cause, the record is completely blank. Mr. Vance does not even say that the loss of business resulted from the fact that appellees reduced their prices. He does not say (and it appears nowhere else in the record) how long that reduction continued. He does not even say that he thinks this was the cause; or that it was the most probable cause; or that there were no other factors in existence which did affect or might have affected the condition of appellant's business.

As this court said in *Continental Oil Co. v. Union Carbide & Carbon Corp.*, 289 F. 2d 86, 90 (1961):

> " '* * * It is well appreciated that a plaintiff has a difficult task in an anti-trust suit and that adherence to strict requirements of proof as to exact quantity of damage may deprive him of the substance of his rights. The law has gone far to ease that burden by permitting proof of losses which border on the speculative, in order to implement the policy of the

anti-trust laws. *But a fair degree of certainty is still essential to show the causative relation of defendants' misconduct and plaintiff's injury.' "* (Italics ours).

It is respectfully submitted that appellant has totally failed to carry its burden of proof on both damages and causal relation.

No Proof That Bridges, Cullen, Gardner and Norwood Were in Competition with Uniform Oil

The amended complaint specifically charges the defendants with a conspiracy whose intent and effect was to eliminate competition from the "independents", including Uniform Oil. It was therefore necessary for Uniform Oil to prove that at the time the defendant retail dealers allegedly conspired they were actually in competition with Uniform Oil. Evidence of this is completely absent. Indeed, the only evidence on this subject is contained in the testimony of Bridges, who emphatically stated that he was not in competition with Uniform Oil, nor were Cullen, Gardner or Norwood. (Tr. 105, 106).

No Evidence of Intent to Raise Prices Back up to "a Higher Pre-determined Level"

The amended complaint charges that the final aim of the conspiracy was to raise prices back up to a higher pre-determined level. Proof of such an intent was surely indispensable to Uniform's claim, for indeed, without it

the alleged conspiracy would be incredible. Again, the record is silent. The matter was never even mentioned, and for lack of this vital proof, Uniform's claim must fall.

No Evidence of Any Effect on Interstate Commerce

As is said in *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F. 2d 732 (1954), Cert. Den. 348 U.S. 817 (1954):

> "Whether a purely local or intrastate conspiracy reasonably restrains interstate commerce is primarily a *factual question*, i.e., does the local price fixing conspiracy affect substantially the flow of interstate commerce? * * * In fact, *unless there is a finding that the local and intrastate activities complained of and as alleged in the indictment, substantially affected interstate commerce, there is no jurisdiction in a district court over the alleged Sherman Act violation*." (Italics ours).

See also *C. A. Page Publishing Co., Inc. v. Work*, 290 F. 2d 334, Cert. Den. 368 U.S. 875 (1961); *Marietta Page v. Work*, 290 F. 2d 323 (1961). (These are civil cases).

In *C. A. Page Publishing Co., Inc., supra*, this court held that:

> "The so-called qualitative test of the illegal per se doctrine does not itself operate to extend federal jurisdiction under Sections 1 and 2 to purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce. *The argument made here by appellant has been squarely rejected by this Court in Las Vegas Merchant Plumbers Ass'n v. United States*, 9 Cir., 1954, 210 F. 2d 732, 747 * * *". (Italics ours).

There is simply no evidence in this record to support any factual finding that the products here involved were in the flow of interstate commerce, and, indeed, we find no contention in appellant's brief that such was the case.

What the record does show is that all of the transactions testified to were *wholly* intrastate in character.

Plaintiff had the burden of showing under the last cited authorities that the alleged price fixing conspiracy was *in* interstate commerce, and there was simply a complete failure of proof in this regard.

Nor is there a scintilla of evidence to support a factual finding of any substantial *effect* on interstate commerce.

On the contrary, the only thing the evidence shows was that the gasoline sold by appellant came either from the Big West refinery at Kevin, Montana, or from the Yellowstone pipeline. Gasoline from that pipeline "was refined in Billings (Montana), mostly from crude, from the Elk Basin Field in Wyoming". (Parenthesis ours). (Tr. 13).

The most that could be drawn from this is the *inference* that some of appellant's gasoline might have been refined from crude out of Wyoming, but this obviously is not subject to inference and must be proved by direct evidence.

All of the cases respecting retail sale of gasoline hold that while there may be certain interstate aspects in the acquisition by the retailer of products and equipment, the retail sale itself is purely intrastate in character. *(Savon Gas Stations No. 6 and A. & H. Transportation, Inc. v. Shell Oil Company*, 203 F. Supp. 529 (1962); *Mitchell v. Livingston & Thebaut Oil Company*, 256 F. 2d 757 (5 Cir. 1958); *Brenner v. Texas Company*, 140 F. Supp. 240 (D.C., N.D., Cal. 1956); *Dial v. Hi Lewis Oil Co.*, 99 F. Supp. 118 (D.C., W.D., Mo. 1951); *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (D.C., S.D., Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D.C., Conn. 1950); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99

(3 Cir. 1946); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (D.C., N.D., Ill. 1943).

Even assuming that some of the gasoline sold came ultimately from Wyoming crude, which was not proved, the record is simply devoid of any evidence of a substantial effect on interstate commerce.

What is said above applies equally to the testimony concerning credit cards.

We find no argument in appellant's brief on this subject of interstate commerce.

It is respectfully submitted that there was no proof that the alleged conspiracy was in interstate commerce, or of substantial effect on interstate commerce, and that on this ground alone, the district court was correct in sustaining the motions for directed verdict, which were made on this ground, among others.

CONCLUSION

Appellant was guilty of multiple failures to prove the essential elements of its claim, any one of which failures necessitated the granting of the motions for directed verdict. The judgment of the trial court should be affirmed.

Respectfully submitted,

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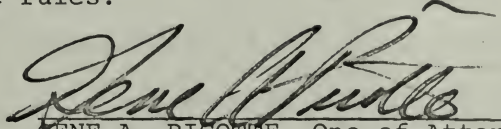
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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CERTIFICATE OF SERVICE BY MAILING

I, GENE A. PICOTTE, one of attorneys for the individual appellees, hereby certify that the foregoing BRIEF ON APPEAL OF THE INDIVIDUAL APPELLEES, BRIDGES, CULLEN, GARDNER AND NORWOOD, was duly served on each of the following:

Mr. Kendrick Smith
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by mailing three (3) copies to each, at their last known address as set forth above, this 13th day of September, 1967.

GENE A. PICOTTE, One of Attorneys for Individual Appellees, Bridges, Cullen, Gardner and Norwood.

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